

**Attachment B**  
**to**  
**North Dakota Department of Health Response to Public Comments**  
**GTL Energy, Ltd.**  
**GTLE Dakota Plant 1 LLC Coal Beneficiation Plant**

**May 7, 2009 Letter from the Teddy Roosevelt Group of the Sierra Club**

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Teddy Roosevelt Group  
North Dakota Chapter, Sierra Club

May 7, 2009



Mr. Craig Thorstenson  
North Dakota Department of Health  
Division of Air Quality  
918 E. Divide Avenue  
Bismarck, ND 58501-1947

RE: GTLE Dakota 1 LLC  
Air Pollution Control  
Permit Application

Dear Mr. Thorstenson:

This letter is a comment on GTL's Air Pollution Control Permit Application for GTLE Dakota 1 LLC, and on the response of the Division of Air Quality of the North Dakota Department of Health ("department") to that application. Specifically, it is a comment respecting the department's conduct of a public comment hearing concerning that application on April 28, 2009, at 7:00 p.m. at the Dickinson City Hall in Dickinson, North Dakota.

The department has before it an application governed by N. D. Admin. Code § 33-15-14-03, Minor source permit to operate. Subdivision a<sup>1</sup> of subsection 5 of N. D. Admin.

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<sup>1</sup> Public participation: This subdivision is applicable to only those sources which apply for a federally enforceable minor source permit to operate which limits their potential to emit an air contaminant. The department shall:

(1) Within ninety days of receipt of a complete application:

- (a) Make a preliminary determination concerning issuance of the permit to operate.
- (b) Make available in at least one location in the county or counties in which the source is located, a copy of the proposed permit and copies of or a summary of the information considered in developing the permit.
- (c) Publish notice to the public by prominent advertisement, in the region affected, of the opportunity for written comment on the proposed permit. The public notice must include the proposed location of the source.
- (d) Deliver a copy of the proposed permit and public notice to any state or federal land manager, or Indian governing body whose lands will be significantly affected by the source's emissions. For purposes of this subparagraph, lands will be considered to be significantly affected if the source is located within thirty-one and seven hundredths miles [50 kilometers] of such land.
- (e) Provide a copy of the proposed permit, all information considered in the development of the permit and the public notice to the regional administrator of the United States environmental protection agency.

(2) Allow thirty days for public comment.

Code § 33-15-14-03 requires the department to provide for public comment. The department initially followed the provisions of subsection a, setting a thirty-day "public comment period" for February 6, 2009, through March 9, 2009. The department then (apparently) chose to exercise its authority under subsection 15 of N. D. Admin. Code § 33-15-14-03, to "extend any of the time periods specified in ... section [33-15-14-03] upon notification of the applicant by the department." The public comment period was thus extended through May 8, 2009. Also, and likely because it was required to do so by the final sentence of N.D.C.C. § 23-01-36<sup>2</sup>, the department responded to requests for a public hearing by scheduling the April 28, 2009 hearing within that public comment period.

Air pollution control is accomplished in North Dakota under N.D.C.C. ch. 23-25 "to achieve and maintain the best air quality possible, consistent with the best available control technology, to protect human health, welfare, and property, to prevent injury to plant and animal life, to promote the economic and social development of this state, to foster the comfort and convenience of the people, and to facilitate the enjoyment of the natural attractions of this state." N.D.C.C. § 23-25-01.1. The department is granted powers and duties respecting air quality control by N.D.C.C. ch. 23-25, Air Pollution Control. Under authority granted by N.D.C.C. § 23-25-03(6), the Department shall:

Provide rules and regulations relating to the construction of any new direct or indirect air contaminant source or modification of any existing direct or indirect air contaminant source which the department determines will prevent the attainment or maintenance of any ambient air quality standard, and require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit such information as may be necessary to permit the department to make such determination.

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- (3) Consider all public comments properly received, in making the final decision on the application.
  - (4) Allow the applicant to submit written responses to public comments received by the department. The applicant's responses must be submitted to the department within twenty days of the close of the public comment period.
  - (5) Take final action on the application within thirty days of the applicant's response to the public comments.
  - (6) Provide a copy of the final permit, if issued, to the applicant, the regional administrator of the United States environmental protection agency, and anyone who requests a copy.

<sup>2</sup> The final sentence of N.D.C.C. § 23-01-36 provides: "[A]ny challenge to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised in any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues that were raised to the department in the permit hearing process." Emphasis added. Failure to provide a public hearing at the request of interested parties potentially aggrieved by the department's permit application decision would deprive them of the only judicial remedy available, and thus violate the due process clauses of the U.S. and North Dakota Constitutions.

N.D.C.C. ch. 23-25 requires a limited amount of public input into the department's conduct by reference to the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32. N.D.C.C. § 23-25-08 provides, in relevant part:

Any proceeding under this chapter for:

1. The issuance or modification of rules and regulations including emergency orders relating to control of air pollution; or
2. Determining compliance with rules and regulations of the department,

must be conducted in accordance with the provisions of chapter 28-32, and appeals may be taken as therein provided.

Emphasis added. The reference in N.D.C.C. § 23-25-08 to N.D.C.C. ch. 28-32 must be understood in the context of N.D.C.C. § 23-01-23, which provides:

"A permit hearing conducted for purposes of receiving public comment or an investigatory hearing conducted under chapters 23-20.1, 23-20.3, 23-25, 23-29, 61-28, and 61-28.1 is not an adjudicative proceeding under chapter 28-32 and is not subject to the requirements of chapter 54-57<sup>3</sup>.

N.D.C.C. § 23-01-23 was enacted in 1995 to specifically preclude application of the "contested case" procedural requirements of the Administrative Agencies Practice Act to environmental permit hearings conducted for the purpose of receiving public comment, because the potential cost requirements for contested case procedures<sup>4</sup> for those type of permit hearings would be "astronomical." See Hearing on Senate Bill 2154 before Senate Judiciary Committee, 54th N.D. Legis. Sess. (Jan. 11, 1995) (testimony of William J. Delmore, Assistant Attorney General for Environmental Section of Health Department). The North Dakota Supreme Court has held: "Under the specific language of N.D.C.C. § 23-01-23, the general procedural requirements for an adjudicative proceeding in N.D.C.C. ch. 28-32 do not apply to a 'permit hearing conducted for purposes of receiving public comment' under N.D.C.C. ch. 23-25, and the hearing is not required to be conducted by an independent administrative law judge." ***People to Save the Sheyenne River v. N.D. Department of Health***, 2005 ND 104, ¶19, 697 N.W.2d 319.

N.D.C.C. § 23-25-03(9) provides that the department shall "[h]old hearings relating to any aspect or matter in the administration of ... [N.D.C.C. ch. 23-25]," and this hearing was to be conducted pursuant to the department's general authority to conduct investigative hearings under that chapter.

<sup>3</sup> N.D.C.C. chapter 54-57 establishes the Office of Administrative Hearings, which provides for independent administrative law judges to conduct adjudicative hearings.

<sup>4</sup> The "contested case procedures" that concerned Mr. Delmore in 1995 were removed in a major overhaul of N.D.C.C. ch. 28-32 made by Chapter 293, 2001 N.D. Session Laws.

The reference in N.D.C.C. § 23-25-08 to N.D.C.C. ch. 28-32 must also be understood in the context of N.D.C.C. § 23-01-36, which provides, in relevant part:

An appeal from the issuance, denial, modification, or revocation of a permit issued under chapter ... 23-25 ... may be made by the person who filed the permit application, or by any person who is aggrieved by the permit application decision, provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation. An appeal must be taken within thirty days after the final permit application determination is mailed by first-class mail to the permit applicant and to any interested person who has requested a copy of the final permit determination during the permit hearing process. Except as provided in this section, an appeal of the final permit determination is governed by sections 28-32-40, 28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49. The department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law. ... [A]ny challenge to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised in any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues that were raised to the department in the permit hearing process.

From these statutes, we learn that the adjudicative proceeding provisions of N.D.C.C. ch. 28-32 do not apply to a permit hearing, except that N.D.C.C. §§ 28-32-40, 28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49 do apply to a judicial appeal from a final permit determination. However, per N.D.C.C. § 23-25-08, the remaining provisions of N.D.C.C. ch. 28-32 do apply to permit hearings. What that means may be determined by reviewing N.D.C.C. ch. 28-32, which consists of these fifty-four sections:

- N.D.C.C. §§ 28-32-01 provides definitions for terms used throughout chapter 28-32, 28-32-26 authorizes an agency to assess the costs of an investigation into a rule violation as a civil penalty, and 28-32-41 concerns the effectiveness of agency orders).
- N.D.C.C. §§ 28-32-02, 28-32-03, 28-32-04, 28-32-05, 28-32-06, 28-32-07, 28-32-08, 28-32-08.1, 28-32-09, 28-32-10, 28-32-11, 28-32-12, 28-32-13, 28-32-14, 28-32-15, 28-32-16, 28-32-17, 28-32-18, 28-32-18.1, 28-32-19, 28-32-20, and 28-32-47 apply to rulemaking and the authority of the administrative rules committee.
- N.D.C.C. §§ 28-32-21, 28-32-22, 28-32-23, 28-32-24, 28-32-25, 28-32-28, 28-32-29 (by implication), 28-32-30, 28-32-32, 28-32-33, 28-32-37, 28-32-38, and 28-32-39 apply only to adjudicative proceedings.
- N.D.C.C. §§ 28-32-27, 28-32-31, 28-32-34, 28-32-35, 28-32-36, 28-32-40, 28-32-42, 28-32-43, 28-32-44, 28-32-45, 28-32-46, 28-32-47, 28-32-49, 28-32-50, 28-

32-51, and 28-32-52 apply to hearings generally, but are not limited to adjudicative hearings.

Thus, N.D.C.C. § 23-25-08 makes applicable to permit proceedings all of these provisions of N.D.C.C. ch. 28-32, except the thirteen identified sections that apply only to adjudicative proceedings, and the definition of "adjudicative proceeding" in N.D.C.C. § 28-32-01. The proceedings of the department in this permit application process fail to comply with the following provisions of North Dakota law, for the following reasons:

1. Pursuant to its rulemaking authority the department has adopted N. D. Admin. Code art. 33-22, Practice and Procedure, which describes the broad jurisdictional provisions in N. D. Admin. Code § 33-22-01-01, Scope, and provides, in relevant part:

The provisions of this article shall apply to all hearings held by the department for the purposes of adjudicating the rights of parties under North Dakota Century Code ... [chapter] 23-25 .... This article shall provide procedures in addition to or in explanation of those procedures provided by ... [chapter 23-25], and North Dakota Century Code chapter 28-32.

Emphasis added. That the general procedural requirements for an adjudicative proceeding in N.D.C.C. ch. 28-32 do not apply to a permit hearing does not mean that a permit hearing is not an adjudicatory proceeding. Rather, it means that a permit hearing is an adjudicatory proceeding under N. D. Admin. Code art. 33-22, Practice and Procedure. Nothing in N.D.C.C. § 23-01-23 affords the department license to ignore its own rules governing adjudication of the rights of all parties under a permit application. Notwithstanding that requirement, the department's hearing officer failed to:

- a. Issue notices and otherwise describe the matter with "a docket number and title, descriptive of the subject matter," as required by N. D. Admin. Code § 33-22-01-05;
- b. Identify and describe the various parties appearing as "Complainant," "Intervenor," "Petitioner," or "Respondent," as required by N. D. Admin. Code § 33-22-01-08;
- c. Recognize the proceeding as requiring "pleadings," or to require GTL, or any other party, to meet any of the pleading requirements of N. D. Admin. Code ch. 33-22-02;
- d. Rule on any "motion," however denominated, made during the hearing, contrary to the requirements of N. D. Admin. Code § 33-22-02-10, or even to answer questions during the hearing;
- e. Provide notice of his appointment as hearing officer to the parties (or perhaps to even secure an appointment as hearing officer), as required by N. D. Admin. Code § 33-22-04-01(1);

- f. Determine the admissibility of evidence in accordance with the practice in the district courts, establish a conflict with that practice, or determine the necessity of waiving the usual common law or statutory rules of evidence to ascertain the substantial rights of the public and interested parties, as required by N. D. Admin. Code § 33-22-05-01;
  - g. Examine witnesses under oath, as required by N. D. Admin. Code § 33-22-05-02; or
  - h. Make reference on the record to any evidence to be afforded "official notice" in the proceeding, as required by N. D. Admin. Code § 33-22-05-02, notwithstanding having spoken extensively before the hearing about information secured and relied upon by the department in its consideration of the permit application.
2. Should the department argue or believe the proceeding was not an "adjudicative" hearing at all, the "hearing" provisions of N.D.C.C. ch. 28-32 that remain applicable pursuant to N.D.C.C. § 23-25-08 describe only "rulemaking" hearings<sup>5</sup>. A "permit hearing" *could* be a "rulemaking hearing" under N.D.C.C. § 23-25-03(6), which requires the department to:

Provide rules and regulations relating to the construction of any new direct or indirect air contaminant source or modification of any existing direct or indirect air contaminant source which the department determines will prevent the attainment or maintenance of any ambient air quality standard, and require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit such information as may be necessary to permit the department to make such determination.

But, if the April 28, 2009 hearing was indeed a rulemaking hearing, the department failed to comply with, among other requirements:

- a. The "emergency rulemaking" requirements of N.D.C.C. § 28-32-03, necessary if the permit decision is to become final within thirty days;
- b. The "regulatory analysis" requirements of N.D.C.C. § 28-32-08;
- c. The "small entities" economic impact statement requirements of N.D.C.C. § 28-32-08.1;
- d. The "takings assessment" requirements of N.D.C.C. § 28-32-09;
- e. The public notice requirements of N.D.C.C. § 28-32-10; and
- f. The requirements of N.D.C.C. § 23-25-02 that a public hearing be conducted by the air pollution control advisory council to consider and recommend the adoption, amendment, or repeal of rules, regulations, and standards as provided in N.D.C.C. ch. 23-25.

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<sup>5</sup> The department's pre-hearing PowerPoint slide show suggests the department doesn't regard a permit proceeding to be rulemaking. Slide 10 includes this statement: "[Air quality] [p]ermitting [p]rocess [d]oes [n]ot ...[c]reate new rules, laws or policies."

COMMENTOR'S REQUEST AND RECOMMENDATION

The department's failures with respect to the April 28, 2009 public hearing cannot be remedied without complying with either its own rules for proceedings for adjudicating the rights of parties under North Dakota Century Code ... [chapter] 23-25, as provided in N. D. Admin. Code § 33-22-01-01, or the rulemaking requirements of N.D.C.C. ch. 28-32 and N.D.C.C. § 23-25-02. No party to this proceeding should be obliged to appeal, or seek any other judicial remedy, when the corrective measures available to the department are so plainly set forth in the law. We therefore respectfully request that the department continue the proceedings concerning GTL's Air Pollution Control Permit Application for GTLE Dakota 1 LLC until the department (and the applicant) have complied completely with the applicable statutes and rules identified in this letter. We recommend that the corrective action consist of a permit hearing conducted as an adjudicatory proceeding consistent with the requirements of N. D. Admin. Code art. 33-22, Practice and Procedure.

Sincerely,



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